Cornell Law Review

Volume 71
Issue 5 *July 1986*

Article 2

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CIVIL ACTIONS UNDER ERISA SECTION 502(a): WHEN SHOULD COURTS REQUIRE THAT CLAIMANTS EXHAUST ARBITRAL OR INTRAFUND REMEDIES?

The Employee Retirement Income Security Act of 1974 (ERISA)[1] preempted state regulation of employee benefit plans[2] and established federal standards to govern their administration. ERISA section 502(a)(1)(B) provides a federal forum for plan participants[3] alleging an improper denial of benefits under the terms of a plan.[4] Section 502(a)(3) permits participants to obtain relief for violations of ERISA's substantive standards of conduct.[5] In enacting section 502(a), Congress sought to protect plan participants and enhance enforcement of ERISA's standards.

ERISA further requires that all employee benefit plans include claims procedures that provide participants with access to internal review of benefit denials by plan administrators.[6] Collectively bargained benefit plans generally incorporate arbitration agreements as

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1 Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 and in scattered sections of the I.R.C. (1982)).

2 ERISA § 514(a), 29 U.S.C. § 1144(a) (1982). *See infra* note 73 and accompanying text.

3 ERISA § 502 provides both participants and beneficiaries of employee benefit plans with access to federal courts. Solely for the sake of brevity, this Note only uses the term "participants." Throughout, the rights accorded plan participants extend equally to plan beneficiaries.

4 ERISA § 502(a)(1)(B) provides in relevant part:

> A civil action may be brought—
> (1) by a participant or beneficiary—
> . . . .
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

29 U.S.C. § 1132(a)(1)(B) (1982).

5 ERISA § 502(a)(3) provides in relevant part:

> A civil action may be brought—
> . . . .
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

29 U.S.C. § 1132(a)(3) (1982).

6 ERISA § 503, 29 U.S.C. § 1133 (1982). *See infra* note 85 and accompanying text. The Secretary of Labor has promulgated regulations which state the minimum acceptable procedures for internal claims review. 29 C.F.R. § 2560.503-1 (1985). *See infra* notes 7 & 122. Plan administrators performing such review are subject to ERISA's standards of fiduciary conduct. *See infra* note 89 and accompanying text.

a means of internally settling benefit disputes.[7] ERISA does not make clear when courts should require that claimants exhaust administrative procedures, be they internal administrator review or arbitration, prior to bringing an action under section 502(a). Nor does the Act define the deference courts should accord the outcome of these proceedings in a subsequent ERISA suit. Traditionally, courts favor administrative resolution of labor disputes by requiring that claimants exhaust arbitral procedures before the courts will exercise jurisdiction. For instance, under section 301 of the Labor Management Relations Act,[8] courts insist on exhaustion of administrative procedures and typically defer to the resulting award in a subsequent suit. Thus, ERISA's civil enforcement provisions create a dilemma for courts, for they must reconcile the dual goals of deference to administrative decisions and judicial enforcement of ERISA's statutory rights. Courts must decide whether to require that an ERISA claimant exhaust administrative procedures and what effect such proceedings should have on subsequent litigation. Unsurprisingly, courts grappling with this problem have reached divergent results.

This Note examines the foundations of the federal policy favoring administrative resolution of labor disputes. Next, it surveys cases attempting to reconcile this policy with ERISA's provisions providing benefit plan participants access to federal courts. Finally, the Note proposes an accommodation of these seemingly incompatible aims. ERISA's legislative history and statutory goals suggest that courts should focus on the nature of the claimant's cause of action. If the claim centers on eligibility for benefits under the plan's terms, the court should require that the claimant exhaust administrative remedies—whether internal review by a plan administrator or binding arbitration. The court should then accord the administrative result great deference in a subsequent ERISA suit. However, if the dispute focuses on an alleged violation of one of ERISA's substantive standards of conduct, the court should generally dispense with the exhaustion requirement and provide the claimant with unbridled access to de novo review of the claim.

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7 According to the Secretary of Labor's regulations setting forth the minimum requirements of internal claims review, grievance and arbitration procedures created by a collective bargaining agreement and incorporated into the appeals process of a benefit plan "will be deemed to comply" with those minimum standards. 29 C.F.R. § 2560.503-1(b)(2)(i) (1985). The vast majority of collective bargaining agreements include an arbitration clause. A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 518 (9th ed. 1981). Unlike internal claims procedures, arbitral procedures provide for final review before a neutral third party.

8 *See infra* notes 9-27 and accompanying text.

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TRADITIONAL DEFERENCE TO LABOR ARBITRATION

ERISA's legislative history states that civil claims arise under[9] section 301 of the Labor Management Relations Act of 1947 (LMRA),[10] which provides access to federal courts to resolve labor disputes but also endorses extrajudicial dispute resolution. Under LMRA section 301(a), an individual may file suit in federal district court for the "violation of contracts between an employer and a labor organization."[11] LMRA section 203(d) establishes the congressional policy favoring "[f]inal adjustment by a method agreed upon by the parties"[12] as the preferred means of settling disputes over the application or interpretation of a collective bargaining agreement.[13] These two sections of the LMRA diverge, for one provides employees with access to federal courts while the other endorses extrajudicial resolution of labor disputes.

The Supreme Court in 1960 resolved this tension in favor of extrajudicial resolution in a trio of cases collectively known as the *Steelworkers* Trilogy.[14] In *United Steelworkers v. American Manufacturing Co.*[15] and *United Steelworkers v. Warrior & Gulf Navigation Co.*,[16] the steelworkers union sought to compel arbitration over disputes with employers. Reasoning that the federal policy favoring arbitration embodied in LMRA section 203(d) could best be effectuated by giving full play to the procedures set forth in the collective bargaining agreement,[17] the Court compelled arbitration in both instances.[18] The Court fashioned a presumption of arbitrability, stating that any ambiguity as to the scope of an arbitration clause in a collective bargaining agreement should be resolved in favor of arbitration.[19] In

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9 *See infra* notes 80-81 and accompanying text.

10 29 U.S.C. §§ 141-187 (1982).

11 29 U.S.C. § 185(a) (1982).

12 29 U.S.C. § 173(d) (1982).

13 *See also* The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982).

14 United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Courts have repeatedly endorsed the *Steelworkers* Trilogy. *See, e.g.*, W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers, 461 U.S. 757, 764-66 (1983); Bowen v. United States Postal Serv., 459 U.S. 212, 224-25 (1983); Adams v. Gould, Inc., 687 F.2d 27, 31 (3d Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983).

See generally Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961).

15 363 U.S. 564 (1960).

16 363 U.S. 574 (1960).

17 *American Mfg.*, 363 U.S. at 566.

18 *Id.* at 569; *Warrior & Gulf*, 363 U.S. at 585.

19 *Warrior & Gulf*, 363 U.S. at 582-83 ("An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitra-

United Steelworkers v. Enterprise Wheel & Car Corp.,[20] the Court scrutinized a post-grievance procedure challenge to the arbitral award, holding that judicial review of the arbitrator's decision is strictly limited to determining whether the arbitrator exceeded his authority under the collective bargaining agreement.[21] The Court refused to examine the merits of the arbitrator's decision.[22]

The Court further promoted arbitration in *Republic Steel Corp. v. Maddox*,[23] holding that an employee alleging a breach of the collective bargaining agreement between his union and employer must first attempt to exhaust administrative remedies provided by the agreement.[24] The Court reasoned that the employee's dispute—here over severance pay following the employee's termination—was "of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship."[25] The Court compelled the employee to permit the

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tion clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

20 363 U.S. 593 (1960).

21 *Id.* at 598.

22 The Court stated:

> [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

Id. at 599. The Court reasoned further that "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* at 596. *See* Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967) (endorsing judicial deference to merits of arbitrator's award); Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427 (1969) (same).

The *Steelworkers* Court principally relied on two policy considerations to support its endorsement of the arbitral process. First, the arbitrator, whom the parties themselves select presumably because of their confidence in her judgment and knowledge of the "law of the shop," is better able to weigh industrial realities than a judge, who might lack such practical experience. *Warrior & Gulf*, 363 U.S. at 578-82. Second, enforcing the federal policy favoring private settlement of disputes avoids adversarial litigation and enhances prospects for labor peace. *Id.* at 577-78. *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (LMRA "expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way"). In addition, allowing the arbitral decision to stand relieves already crowded federal courtrooms of an added burden.

One commentator argues that the deference accorded arbitral awards arises because the arbitrator's interpretation of the contract is itself part of the contract the parties seek to enforce. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and its Progeny*, 75 MICH. L. REV. 1137, 1141-42 (1977) ("Courts will ordinarily enforce an arbitral award because it is part of the parties' contract, and . . . courts are in the business of enforcing contracts.").

23 379 U.S. 650 (1965).

24 *Id.* at 656-57. Under the agreement, arbitration provided the employee's sole remedy. *Id.* at 657-59.

25 *Id.* at 656.

union to pursue the established grievance procedure on his behalf prior to bringing suit under the LMRA.[26]

Following *Republic Steel,* courts generally require exhaustion of administrative grievance procedures set forth in a collective bargaining agreement before entertaining suits over which they might otherwise have jurisdiction.[27] By requiring exhaustion of administrative remedies and according great deference to the results reached in such proceedings, the Supreme Court breathed life into the federal policy favoring arbitration. The Court thus resolved the tension between LMRA section 301(a) and the national labor policy of promoting arbitration by embracing arbitration at the expense of individual access to federal courts.

II
JUDICIAL EFFORTS TO RECONCILE ERISA WITH TRADITIONAL LABOR POLICY

Recent federal legislation has eroded the presumption of arbitrability and corresponding exhaustion requirement first articulated in the *Steelworkers* Trilogy. Through employee protective legislation, Congress has exerted increased control over the employer/employee relationship and has granted employees substantive rights independent of their employment agreements.[28] This trend has

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26 *Id.* at 653. This requirement complements the union's status as the employee's exclusive bargaining representative, providing the union with a means of enhancing its prestige by handling the grievance expeditiously. *Id.* The employer benefits from the limit on employee remedies which, in keeping with the *Steelworkers* Trilogy, are confined to arbitration. *Id.* Finally, grievance procedures are ordinarily adequate to protect an aggrieved employee's interests. *Id.*

27 Courts have discretion to assert jurisdiction over such suits, but as a matter of federal labor policy they generally should not do so. NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 426 (1968); Buzzard v. Local Lodge 1040 Int'l Ass'n of Machinists & Aerospace Workers, 480 F.2d 35, 41 (9th Cir. 1973). The exhaustion requirement enables administrative procedures to refine the issues and sharpen the dispute, which may aid the court in a subsequent civil suit. *Buzzard,* 480 F.2d at 41. Exhaustion also conserves judicial resources. *Id.* at 41-42.

The Supreme Court has recognized some exceptions to the exhaustion requirement. First, when the conduct of the employer amounts to a repudiation of the collective bargaining agreement, the employer is estopped from raising the unexhausted arbitration procedures as a defense to the employee's cause of action. Drake Bakeries Inc. v. Local 50, Am. Bakery & Confectionary Workers Int'l, 370 U.S. 254, 260-63 (1962). Second, an employee need not exhaust if he can prove that his union has breached its duty of fair representation in wrongfully failing to assert his grievance. Vaca v. Sipes, 386 U.S. 171, 185-87 (1967). Finally, exhaustion is not required if it "would be wholly futile." Glover v. St. Louis-San Francisco Ry., 393 U.S. 324, 330 (1969).

28 Examples of such legislation include title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982), the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982), and ERISA.

presented the courts with a dilemma: when should the federal labor policy favoring administrative settlement of disputes give way to court enforcement of federal statutory rights?[29]

These conflicting goals frequently clash in the context of ERISA civil claims. In ERISA, Congress established standards for participation and vesting,[30] funding,[31] fiduciary responsibility,[32] and reporting and disclosure,[33] and enabled plan participants to enforce those standards through civil actions in federal court.[34] Specifically, section 502(a)(1)(B) empowers plan participants to bring civil actions to recover benefits, enforce rights, or clarify rights to future benefits under the terms of the plan.[35] Participants may also bring suit in federal court pursuant to section 502(a)(3) for breach of fiduciary duty or violations of ERISA's statutory standards.[36]

Congress envisioned that civil actions would provide the primary means of enforcing ERISA's protections.[37] This policy undermines the long-established federal labor policy favoring arbitration and exhaustion of grievance procedures. Attempting to reconcile these policies, courts have generally agreed that claimants bringing plan-based actions under section 502(a)(1)(B) must exhaust administrative procedures and the administrative result should be accorded great deference.[38] Courts have disagreed, however, over

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29 Increasingly, the policy favoring arbitral settlement of disputes has given way to the courts' desire to enforce the policy embodied in federal legislation. *See* Castle & Lansing, *Arbitration of Labor Grievances Brought Under Contractual and Statutory Provisions: The Supreme Court Grows Less Deferential to the Arbitration Process*, 21 AM. BUS. L.J. 49 (1983).

Overlaps between contractual remedies provided by the collective bargaining agreement and those provided by federal law create special problems for arbitrators. The arbitrator must decide which should control—the contract or the statute. *See* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 289 (1980) (arguing that "[a]bsent the rare case of manifest illegality, . . . the arbitrator should apply the contract . . . and leave it to the courts to import the requirements of law"); *see also* Meltzer, *supra* note 14.

For a discussion of the problems ERISA presents for arbitrators, see Murphy, *The Impact of ERISA on Arbitration*, 32 ARB. J. 123, 125-28 (1977).

30 ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1982).

31 *Id.* §§ 301-306, 29 U.S.C. §§ 1081-1086 (1982).

32 *Id.* §§ 401-414, 29 U.S.C. §§ 1101-1114 (1982).

33 *Id.* §§ 101-111, 29 U.S.C. §§ 1021-1031 (1982).

34 *Id.* §§ 501-514, 29 U.S.C. §§ 1131-1144 (1982).

35 *See supra* note 4.

36 *See supra* note 5.

37 *See infra* note 132 and accompanying text.

38 For the purposes of this Note, "administrative procedures" include both intrafund claim review procedures required by ERISA and collectively bargained grievance procedures, usually culminating in binding arbitration. *See supra* notes 6-7 and accompanying text. The nature of the judicial deference accorded an administrative result may vary depending on the type of administrative procedure that produced it. A court defers to a plan fiduciary's decision after intrafund administrative review by employing a low standard to review the decision. *See infra* note 57 and accompanying text. Alternatively, a court may defer to an arbitral result by granting it preclusive effect. *See*

whether the exhaustion requirement should apply to statute-based actions brought under section 502(a)(3), and, if an administrative resolution is reached in such a claim, how much deference it should be accorded.

A. Exhaustion of Administrative Procedures

Courts uniformly hold that the failure of a participant to exhaust internal review procedures when challenging a benefit denial under the terms of a benefit plan will bar his subsequent suit under ERISA section 502(a)(1)(B).[39] Courts disagree, however, as to whether a plaintiff must exhaust administrative procedures where he alleges a violation of one of ERISA's substantive standards under section 502(a)(3).

In *Kross v. Western Electric Co.*,[40] for example, the district court imposed an exhaustion requirement on a plaintiff alleging violations of substantive rights granted by ERISA. Western Electric discharged the plaintiff during a substantial reduction in its work force. Had the plaintiff remained with the company two more years he would have accrued additional pension benefits.[41] Five years after his discharge, the plaintiff filed a class action under section 502(a)(3), alleging that Western Electric violated section 510.[42] The

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infra note 58 and accompanying text. This Note refers to both types of judicial treatment of administrative results as "deference."

39 *See, e.g.*, Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980) (where pension plan created by collective bargaining agreement provided appeals procedures for benefit denials, employee must exhaust those procedures prior to bringing suit under ERISA); Worsowicz v. Nashua Corp., 612 F. Supp. 310 (D.N.H. 1985) (action by widow of employee seeking life insurance and retirement benefits dismissed; access to federal courts under ERISA predicated on exhaustion of internal remedies); Ridens v. Voluntary Separation Program, 610 F. Supp. 770 (D. Minn. 1985) (failure to exhaust intrafund remedies barred action to challenge severance benefit denial); Tomczyscyn v. Teamsters, Local 115 Health & Welfare Fund, 590 F. Supp. 211 (E.D. Pa. 1984) (claim by decedent's beneficiaries challenging denial of death benefits dismissed because of claimants' failure to exhaust intrafund appeals procedures; futility exception to exhaustion requirement narrowly construed); Scheider v. United States Steel Corp., 486 F. Supp. 211 (W.D. Pa. 1980) (failure to exhaust intrafund remedies barred employee's suit contesting denial of pension benefits); Sample v. Monsanto Co., 485 F. Supp. 1018 (E.D. Mo. 1980) (where disability benefit plan's appeals procedure called for binding arbitration before medical board, employee's action dismissed for failure to exhaust administrative remedy); Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816 (E.D.N.C. 1978) (intrafund appeals procedure set forth in collective bargaining agreement; ERISA suit challenging denial of benefits under pension plan predicated on exhaustion of this procedure).

40 701 F.2d 1238 (7th Cir. 1983).

41 *Id.* at 1239.

42 ERISA § 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of

district court dismissed the claim, holding that the plaintiff's failure to exhaust the internal review procedures set forth in the pension plan precluded his subsequent suit.[43]

On appeal, Kross argued that the court should refrain from applying an exhaustion requirement where ERISA's substantive guarantees, rather than the pension plan's provisions, provided the basis for the claim.[44] The court noted that ERISA fails to indicate whether exhaustion of administrative remedies is a prerequisite to an action, concluding that policy considerations demand that courts ordinarily require exhaustion.[45] The court reasoned that an exhaustion requirement provides a nonadversarial forum for claims settlement, minimizes costs, and enables plan administrators to carry out their duties under ERISA.[46] Numerous courts have adopted the *Kross* approach, requiring ERISA claimants to exhaust internal pension plan procedures prior to gaining access to federal courts, even where the plaintiff alleges that his employer violated a specific ERISA standard.[47]

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any right to which such participant may become entitled under [an employee benefit] plan . . . .

29 U.S.C. § 1140 (1982). The plaintiff alleged that Western Electric terminated him in order to avoid paying him benefits. 701 F.2d at 1239.

43 *Id.* at 1239.

44 *Id.* at 1241.

45 *Id.* at 1244-45. The court acknowledged that under extraordinary circumstances, the district court should be free to exercise its discretion by granting a federal forum prior to exhaustion. *Id.*

46 *Id.* These policies are more fully explored at *infra* notes 85-95 and accompanying text.

Other courts have criticized *Kross* for failing to distinguish between claims alleging violations of ERISA's substantive standards and claims focusing on proper interpretation of a pension plan. *See, e.g.*, Amaro v. Continental Can Co., 724 F.2d 747, 752 (9th Cir. 1984) ("[W]e find *Kross* to be based on a flawed premise, and we refuse to follow it."); Grywczynski v. Shasta Beverages, Inc., 606 F. Supp. 61, 64 (N.D. Cal. 1984) (same); McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1504 (D.N.J. 1985) (same).

47 In Delisi v. United Parcel Serv., Inc., 580 F. Supp. 1572 (W.D. Pa. 1984), a federal district court dismissed an employee's action charging that his termination was desigued to deprive him of pensions rights. The plaintiff, a union member and longtime employee of UPS, suffered from a mental condition allegedly arising out of an incident in which a co-worker and close friend died in an explosion while unknowingly delivering a package containing a bomb. The plaintiff was institutionalized for his illness on several occasions. During his last hospital stay, he applied for a disability pension provided by a collective bargaining agreement between UPS and his union. In response, UPS fired him, allegedly for insubordination. The plaintiff submitted a grievance protesting his discharge, only to be rebtuffed by UPS. *Id.* at 1574. Rather than exhausting the grievance procedures provided by the collective bargaining agreement, the plaintiff filed suit alleging that UPS fired him in violation of ERISA § 510, *see supra* note 42. The court held that the plaintiff's remedies under the collective bargaining agreement barred his action. 580 F. Supp. at 1575. *See also, e.g.*, Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985) (employees' ERISA suit alleging that plant shutdown was partly motivated by desire to prevent vesting of pension rights barred because of employees' failure to exhaust arbitration procedures provided by collective bargaining

Other courts have declined to require exhaustion where the claimant charges that the defendant violated one of ERISA's statutory standards of conduct. For example, in *McLendon v. Continental Group, Inc.*,[48] a district court explicitly rejected *Kross*,[49] holding that former employees need not exhaust grievance procedures provided by a collective bargaining agreement prior to bringing suit in federal court charging their employer with discrimination based on pension status. The plaintiffs filed a class action alleging that Continental discharged employees in order to reduce pension costs, in violation of section 510.[50] Continental moved to dismiss the ERISA counts, arguing that the claimants must exhaust grievance procedures (including arbitration) as a prerequisite to seeking a judicial forum. The court denied the motion, reasoning that the question before the court was not the plaintiffs' eligibility under the plan, because indisputably the plaintiffs did not qualify for the pension. Rather, the issue was whether Continental had discriminated on the basis of pension status in violation of section 510.[51] The court further reasoned that section 510 rights, including the right to file suit in federal court, could not be prospectively waived via an agreement to arbitrate. Therefore, the court did not require the claimants to exhaust their arbitral remedy before bringing an action under section 502(a)(3).[52]

Several courts have also held that a plaintiff alleging a violation of one of ERISA's substantive standards of conduct may maintain an action in federal court despite a prior agreement to submit employ-

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agreement), *cert. denied*, 106 S. Ct. 863 (1986); Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276 (3d Cir. 1984) (dispute between union and employer over content of collective bargaining agreement containing employee benefit plan subject to agreement's arbitration clause; ERISA claim dismissed pending arbitrator's interpretation of agreement's meaning); Challenger v. Local 1, Int'l Bridge, Structural, & Ornamental Ironworkers, 619 F.2d 645 (7th Cir. 1980) (suit alleging improper denial of benefits under collectively bargained pension plan dismissed for failure to exhaust arbitral remedy); Chambers v. European Am. Bank & Trust Co., 601 F. Supp. 630, 640 (E.D.N.Y. 1985) (former employee's cause of action based upon employer's failure to meet ERISA's notice requirements barred for failure to exhaust intrafund procedures); Brown v. Babcock & Wilcox Co., 589 F. Supp. 64 (S.D. Ga. 1984) (action alleging denial of benefits constituting breach of fiduciary duty subject to requirement that intrafund procedures—as distinct from arbitration agreement in collective bargaining agreement—be exhausted). Although these cases require exhaustion of collective bargaining agreement grievance procedures, they do not discuss the degree of deference courts should accord the administrative result.

48 602 F. Supp. 1492 (D.N.J. 1985).

49 *Id.* at 1504.

50 *Id.* at 1497. For the text of § 510, see *supra* note 42. Continental pleaded economic necessity, conceding that although pension costs were considered in making its business decisions, they were only one of many factors. 602 F. Supp. at 1498.

51 *Id.* at 1503-04.

52 *Id.* at 1504-05.

ment disputes to binding arbitration.[53] Similarly, other courts have ruled that a plaintiff alleging ERISA violations need not exhaust internal procedures set forth in the pension plan prior to seeking access to federal court under section 502(a)(3).[54]

As this discussion demonstrates, courts are divided as to the propriety of requiring exhaustion in civil suits under section 502(a)(3). Some courts have required that ERISA plaintiffs exhaust administrative remedies—whether arbitration pursuant to a collective bargaining agreement or intrafund review procedures set out in the plan—prior to seeking relief in federal court.[55] Other courts have chosen to entertain jurisdiction even though the claimant has failed to exhaust administrative remedies.[56]

B. Deference to Administrative Results

The above cases focused on whether courts in section 502 actions should require exhaustion of administrative dispute resolution procedures. A related question remains: to what degree should courts defer to the administrative results? Courts generally apply a deferential "arbitrary and capricious" standard of review when scrutinizing benefit denials following exhaustion of intrafund procedures, and, as a result, typically uphold the plan administrators'

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53 *See, e.g.,* Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985) (despite contractual agreement to arbitrate disputes arising out of employment, plaintiff need not arbitrate count alleging refusal to provide an accounting in violation of ERISA); Lindahl v. American Tel. & Tel. Co., 609 F. Supp. 267 (N.D. Ill. 1985) (employee alleging breach of fiduciary duty need not exhaust arbitral remedy created by collective bargaining agreement prior to bringing suit; statutory and contractual claims represent independent remedies); Brown v. Babcock & Wilcox Co., 589 F. Supp. 64 (S.D. Ga. 1984) (following plant closure and denial of benefits, action alleging breach of fiduciary duty need not be arbitrated pursuant to collective bargaining agreement; imposition of such requirement would result in "double exhaustion").

54 For example, in Garry v. TRW, Inc., 603 F. Supp. 157 (N.D. Ohio 1985), the court held that the plaintiff's failure to exhaust intrafund procedures did not bar his subsequent suit alleging that his employer violated ERISA § 510 by terminating him in order to prevent the accrual of pension rights. The plaintiff had worked for TRW for 17 years, and alleged that TRW followed the practice of replacing older employees with newer ones in order to reduce pension costs. The court explicitly rejected the reasoning of the *Kross* decision. *Id.* at 164. *See also, e.g.,* Janowski v. International Bhd. of Teamsters Local No. 710 Pension Fund, 673 F.2d 931 (7th Cir. 1982) (class action on behalf of plan participants to determine whether plan conforms to ERISA's provisions not subject to exhaustion requirement; issue solely one of statutory interpretation without need for factual record), *vacated,* 463 U.S. 1222 (1983); Grywczynski v. Shasta Beverages, Inc., 606 F. Supp. 61 (N.D. Cal. 1984) (former workers charging employer with nationwide purge of longstanding employees in order to reduce pension costs need not exhaust intrafund procedures); Clouatre v. Lockwood, 593 F. Supp. 1136 (M.D. La. 1984) (claimant charging employer violated ERISA's notice requirements need not exhaust internal remedies; exhaustion requirement discretionary and inappropriate where dispute is solely one of law).

55 *See supra* notes 39-47 and accompanying text.

56 *See supra* notes 48-54 and accompanying text.

decisions.[57] Similarly, several courts have held that an arbitral award resolving a plan-based dispute precludes subsequent judicial review of the claim's merits.[58] In effect, these courts treat the arbitral decision as res judicata in a subsequent section 502(a)(1)(B) suit.[59] However, when a plaintiff's claim alleges a violation of ERISA's substantive standards, courts disagree on the proper balance between the conflicting federal policies of deferring to administrative dispute resolution and providing a judicial forum for statutory claims.

Electing to defer to administrative results, the court in *King v. James River-Pepperell, Inc.*[60] ruled that a settlement reached between the plaintiff's union and employer barred his subsequent section 502(a)(3) suit alleging a violation of ERISA's substantive standards of conduct. The plaintiff, a long-time employee, became totally and permanently disabled as the result of an industrial accident. Upon learning of the extent of the plaintiff's injuries, management terminated him. The plaintiff's union filed a grievance on his behalf, reaching a settlement shortly thereafter.[61] Several years later, the plaintiff filed suit, alleging that his pension rights would have vested had he remained employed for another four months.[62] Reasoning that a decision rendered by an arbitrator is res judicata as to subsequent suits under ERISA, the court held that the plaintiff compromised his claim by accepting the settlement. The court concluded, "To allow plaintiff . . . to see[k] identical relief in this Court would defeat ERISA's goal of achieving final resolution of employee griev-

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57 *See generally* Note, *Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test*, 71 CORNELL L. REV. 986 (1986) (presenting cases that apply arbitrary and capricious test and arguing that this test is too deferential). An analysis of the propriety of the arbitrary and capricious standard of review is beyond the scope of this Note.

58 *See, e.g.*, Delaney v. Union Carbide Corp., 749 F.2d 17 (8th Cir. 1984) (employee's application for permanent disability benefits denied by medical arbitration board; arbitration agreement contained in benefit plan and collective bargaining agreement deemed valid, enforceable and binding); Mahan v. Reynolds Metals Co., 569 F. Supp. 482 (E.D. Ark. 1983) (employee bound by medical arbitration board's finding that he was not permanently disabled and was therefore not entitled to benefits under plan; arbitral result res judicata as to issue of disability), *aff'd on other grounds*, 739 F.2d 388 (8th Cir. 1984); Wilson v. Fischer & Porter Co. Pension Plan, 551 F. Supp. 593 (E.D. Pa. 1982) (arbitrator's finding that plan's denial of benefits was proper barred subsequent suit by union member alleging that plan administrators breached fiduciary duty).

59 Under the doctrine of res judicata, a final judgment of the merits precludes the relitigation of claims which were or could have been raised in that action. Nevada v. United States, 463 U.S. 110, 130 (1983).

60 592 F. Supp. 54 (D. Mass. 1984).

61 Under the terms of the settlement, James River reimbursed the plaintiff for a portion of his medical expenses and permitted him to "convert certain medical insurance." *Id.* at 55.

62 The plaintiff alleged that James River violated ERISA § 510. *Id. See supra* note 42.

ances at the administrative level and would increase unjustifiably the costs of settling the claim."[63]

Other courts reject the approach exemplified by the *King* case and do not defer to prior administrative results in section 502(a)(3) suits. For example, the Ninth Circuit in *Amaro v. Continental Can Co.*[64] held that a binding arbitral decision was not res judicata in a subsequent suit alleging a violation of section 510. The plaintiffs were former Continental employees laid off from one of the firm's plants. The employees' union filed a grievance charging that the layoffs violated the collective bargaining agreement between the union and Continental. The union pursued the claim through binding arbitration, the final step in the grievance procedures set forth in the collective bargaining agreement. The arbitrator denied the grievance, deciding that changing market conditions justified Continental's conduct.[65] The plaintiffs subsequently filed suit in federal district court, alleging that Continental laid them off to prevent their qualification for pension rights.[66] The district court dismissed the suit[67] and the Ninth Circuit reversed, holding that ERISA created employee rights wholly independent of collectively bargained rights even though the grievance and subsequent lawsuit were based upon identical facts.[68] The court stated, "To hold otherwise would endanger the protection afforded employees by Congress' enactment of ERISA,"[69] and remanded the case, instructing the district court to consider the statutory claims de novo.[70] Thus, rather than defer to the administrative outcome, the court simply ignored it.

As the above discussion demonstrates, courts have recognized the tension between the labor law presumption favoring administrative dispute resolution and the substantive protections ERISA provides plan participants. The courts have reached widely divergent conclusions when balancing these competing policies. These inconsistent results undermine Congress's goal of uniformity in the law governing employee benefits plans[71] and render uncertain the

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63 592 F. Supp. at 56.

64 724 F.2d 747 (9th Cir. 1984).

65 *Id.* at 748.

66 *Id.*

67 *Id.* at 749.

68 *Id.*

69 *Id.* at 750. The court feared that if the arbitrator's decision could preclude a subsequent suit in federal court, "[a]n ERISA claim could be defeated without the benefit of the protections inherent in the judicial process." *Id.*

70 *Id.* at 753. The court further held that the arbitral result could be admitted as evidence bearing upon factual matters in the trial. *Id.* (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974) (post-arbitration suit under title VII)). *See infra* note 146 and accompanying text. Nevertheless, the court emphasized that the claim must be considered de novo. 724 F.2d at 753.

71 *See infra* notes 124-27 and accompanying text.

rights of plan participants and the duties of those who administer them.[72]

III
RECONCILING THE INCONSISTENT AIMS OF LABOR POLICY AND ERISA

The inconsistent results reached by the federal courts are not surprising, for Congress provided little guidance: ERISA itself mentions neither exhaustion nor arbitration. Nevertheless, ERISA's legislative history and underlying aims do provide a reasoned basis for deciding, first, whether courts should require claimants to exhaust administrative procedures set forth in either the plan or a collective bargaining agreement before bringing suit under ERISA, and second, what force courts should give results achieved through such administrative means.

ERISA's explicit preemption of state law in the employee benefits area[73] suggests that Congress intended federal courts to fashion a doctrine of exhaustion and deference to administrative outcomes that promotes the statute's underlying aims. Moreover, the late Senator Javits, a principal sponsor of the Act, recognized the need for courts to develop federal common law in order to fill the gaps created when Congress exercised its preemptive power over the field, stating, "[i]t is . . . intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."[74]

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72 Supreme Court Justice White recently noted the unsettled state of the law in this area. Mason v. Continental Group, Inc., 106 S. Ct. 863 (1986) (White, J., dissenting from denial of certiorari). He urged the Court to grant certiorari "in order to resolve the uncertainty over the existence of an exhaustion requirement in cases of this kind." *Id.* at 864. In light of the growing volume and significance of ERISA litigation, he continued, "the need for clear procedural rules governing access to the federal courts is imperative. . . . Accordingly, the conflict among the circuits over the issue of an exhaustion requirement under ERISA can hardly be passed over as an unimportant one unworthy of this Court's attention." *Id.*

73 ERISA § 514(a)provides:

> [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

29 U.S.C. § 1144(a) (1982). Citing "the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans," Congress displaced state law in the field of employee benefit programs. 120 CONG. REC. 29,942 (1974) (statement of Sen. Javits). Congressman Dent termed the preemption of state law the "crowning achievement" of ERISA. 120 CONG. REC. 29,197 (1974). *See generally* Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514,* 62 TEX. L. REV. 1313 (1984).

74 120 CONG. REC. 29,942 (1974).

Senator Williams, also a principal sponsor of the bill, stated that ERISA "intended to preempt [state law] for Federal regnlation." 120 CONG. REC. 29,933 (1974). *See*

Courts have interpreted these remarks as an invitation to impose an exhaustion requirement and to defer to administrative results when ERISA's purposes will be served.[75]

Courts can best promote ERISA's aims by focusing on the underlying source of the complaint. If the claim involves a factual dispute relating to a beneficiary's eligibility or the proper interpretation of benefit plan terms (a section 502(a)(1)(B) claim), then the court should usually require that claimants exhaust administrative procedures. Furthermore, the court should accord an arbitral result in such a case the deference traditionally granted arbitral awards in labor law.[76] However, if the claim alleges violations of ERISA's substantive standards of conduct, a court should require exhaustion only when it does not unfairly prejudice the plaintiff's claim. Furthermore, should a participant unsuccessfully exhaust arbitral or intrafund remedies and later bring a section 502(a)(3) action alleging substantive violations of ERISA, the administrative outcome should not affect the plaintiff's right to de novo review of the claim in federal courts.

A. Claims for Benefits Under the Terms of a Plan—Section 502(a)(1)(B) Actions

ERISA provides those denied pension plan benefits with access to federal courts. Section 502(a)(1)(B) empowers employee benefit plan participants to bring civil actions to recover benefits, enforce rights, or clarify rights to future benefits under the terms of the plan.[77] Such actions typically focus on proper interpretation of plan provisions[78] or factual issues on which eligibility for plan benefits depends.[79]

ERISA's legislative history demonstrates that Congress in-

Authier v. Ginsberg, 757 F.2d 796, 799 n.5 (6th Cir.) ("preemption provision was intended to create a body of federal substantive law regulating pension plans"), *cert. denied,* 106 S. Ct. 208 (1985).

75 *See* Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980); Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816, 818-19 (E.D.N.C. 1978).

76 In other words, courts should not review the merits of the arbitrator's decision. *See supra* notes 20-22 and accompanying text. For a discussion of the proper degree of deference to benefit denials under a plan's terms after exhaustion of intrafund review procedures, see Note, *supra* note 57.

77 For the text of § 502(a)(1)(B), see *supra* note 4.

78 *See, e.g.,* Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276, 277 (3d Cir. 1984) (employer's duty to pay health insurance premiums of striking employees); Wilson v. Fischer & Porter Co. Pension Plan, 551 F. Supp. 593, 594 (E.D. Pa. 1982) (method of calculating pension benefits).

79 *See, e.g.,* Mahan v. Reynolds Metals Co., 569 F. Supp. 482 (E.D. Ark. 1983) (medical arbitration board's finding that plaintiff could perform bargaining unit work), *aff'd on other grounds,* 739 F.2d 388 (8th Cir. 1984).

tended to subordinate the right of plan participants to bring a section 502(a)(1)(B) action to the traditional federal policy favoring administrative resolution of labor disputes. The conference report on the Act provides that these actions "are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."[80] Commentators have unanimously construed this portion of the conference report as demonstrating Congress's intent that the judicial treatment of LMRA section 301 suits applies to actions brought under ERISA section 502(a)(1)(B).[81] Exhaustion of administrative remedies[82] and judicial deference to the resulting decision[83] have long been the rule in section 301 actions. The conference report ties these LMRA section 301 practices to actions under ERISA section 502(a)(1)(B). In addition, ERISA section 514(d) provides that ERISA does not supersede other federal law.[84] Existing federal law, most notably the LMRA, establishes the policy of great judicial deference to administrative resolution of disputes in the field of labor law. Section 514(d) suggests that ERISA suits are subject to that longstanding policy. Therefore, courts should ordinarily require exhaustion of administrative procedures and defer to their outcome whether the procedures consist of intrafund review of plan administrators' decisions or formal grievance proceedings leading to binding arbitration.

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80 H.R. REP. No. 1280, 93d Cong., 2d Sess. 327 (conference report), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5038, 5107.

81 *See, e.g.*, Donaldson, *The Use of Arbitration to Avoid Litigation under ERISA*, 17 WM. & MARY L. REV. 215, 216-27 (1975); Schneider, *Surviving ERISA Preemption: Pension Arbitration in the 1980's*, 16 COLUM. J.L. & SOC. PROBS. 269, 279 (1980).

Rather than implying that all gaps in the provisions allowing for civil suits for benefits claims were to be filled "in similar fashion" to the gaps in § 301, this passage could be construed merely as an acknowledgment that, like the LMRA, ERISA preempts state law. ERISA § 514(a) bolsters this reading of the report, for it provides that ERISA supersedes all state law that relates to employee benefit plans. *See supra* notes 73-74 and accompanying text. Under this view, ERISA simply wipes clean the slate of state pension regulation, leaving federal courts free to fashion a new body of federal common law to deal with such issues as exhaustion. Thus, when deciding whether to impose an exhaustion requirement, the courts may consider the underlying policies of ERISA without regard to the judicial baggage of LMRA § 301. One commentator alluded to such a construction of the conference report in a discussion of an ERISA plaintiff's right to trial by jury. Note, *The Right to Jury Trial in Enforcement Actions Under Section 502(a)(1)(B) of ERISA*, 96 HARV. L. REV. 737, 742 (1983). However, no court has endorsed or even considered this view in the context of exhaustion.

82 *See supra* notes 23-27 and accompanying text.

83 *See supra* notes 20-22 and accompanying text.

84 ERISA § 514(d) provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." 29 U.S.C. § 1144(d) (1982).

1. *Intrafund Procedures*

In addition to the link Congress forged between benefit claim suits under ERISA section 502(a)(1)(B) and suits under LMRA section 301, ERISA's statutory scheme provides evidence that Congress specifically intended that claimants exhaust internal procedures prior to bringing an action under ERISA. The same evidence supports a judicial policy of deference to the results of these intrafund procedures.

a. *Exhaustion.* ERISA section 503 requires that all employee benefit plans establish a benefit claims procedure.[85] Courts have noted that by imposing such claims resolution procedures Congress hoped to reduce the number of frivolous lawsuits under ERISA, promote consistent treatment of benefit claims, provide a nonadversarial forum to settle such claims, and minimize settlement costs.[86] Filtering all benefit claims through the intrafund review process furthers these goals. It also reduces the number of lawsuits challenging denials of plan benefits, easing the burden on already crowded courts.[87] Requiring exhaustion of intrafund review procedures ensures that the benefits Congress envisioned will accrue. As one court remarked, "It would certainly be anomalous if the same good reasons that presumably led Congress and the Secretary to require covered plans to provide administrative remedies for aggrieved claimants did not lead the courts to see that those remedies are regularly used."[88]

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85 ERISA § 503 provides:

> In accordance with regulations of the Secretary, every employee benefit plan shall—
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> (1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133 (1982).

Pursuant to ERISA § 505, 29 U.S.C. § 1135 (1982), the Secretary of Labor has promulgated regulations establishing minimum requirements for benefit plan claims procedures. These regulations set forth the standards with which such procedures must comply. 29 C.F.R. § 2560.503-1 (1985). *See infra* note 122.

86 *See, e.g.,* Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980); Taylor v. Bakery & Confectionary Union & Indus. Int'l Welfare Fund, 455 F. Supp. 816, 819-20 (E.D.N.C. 1978).

87 *See* Chambers v. European Am. Bank & Trust Co., 601 F. Supp. 630, 640 (E.D.N.Y. 1985) ("Congress's intent . . . was not to burden the courts with managing these programs").

88 Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980).

Senator Williams, a principal sponsor of ERISA, stated that "prior to bringing an action to recover benefits from the plan, the participant or beneficiary would have the right to receive written notice from the plan of the special reasons his claim for benefits

Exhaustion of intrafund remedies also furthers the congressional mandate that administrators assume responsibility for the management of plans covered by ERISA, a goal illustrated by ERISA's imposition of broad fiduciary obligations on plan trustees.[89] By requiring exhaustion, courts enhance the administrators' ability to manage their funds efficiently by preventing premature judicial intervention into the claims-settlement process.[90] Exhaustion also enhances efficiency by serving to sharpen the dispute and develop a factual record should judicial review ultimately be required.[91]

Finally, requiring exhaustion of internal claims procedures serves the congressional aim of encouraging employers to offer employee benefit plans because by reducing litigation costs it reduces the expense of plan administration. In *Taylor v. Bakery & Confectionary Union & Industry International Welfare Fund,*[92] the court reasoned that "[t]ied to these int[ra]fund claims procedures was Congress' awareness of the potential costs of pension reform, and it sought to 'strike a balance between providing meaningful reform and keeping costs within reasonable limits.' "[93] Noting Congress's desire to foster development of employee benefit plans,[94] the court continued:

> If claimants were allowed to litigate the validity of their claims before a final trustee decision was rendered, the costs of dispute settlement would increase markedly for employers. Employees would also suffer financially because, rather than utilize a simple procedure which allows them to deal directly with their employer, they would have to employ an attorney and bear the costs of adversary litigation in the courts.[95]

Together, these elements of ERISA's legislative history and statutory goals—the invocation of LMRA section 301, the preservation of existing federal law, the requirement that all benefit plans adopt claims procedures, the imposition of fiduciary obligations,

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was denied; and, in addition, *would be entitled* to a full and fair review by the plan administrator of the decision to deny such benefits." 120 CONG. REC. 29,933 (1974) (emphasis added). To state that a claimant is *entitled* to "full and fair review" is not to say that such administrative review *must* be obtained prior to gaining access to federal courts. This language suggests that Congress did not intend that exhaustion be required, but rather that the claimant is free to choose either remedy. However, the great bulk of contrary legislative evidence outweighs this isolated comment.

89 *See* ERISA §§ 402-412, 29 U.S.C. §§ 1102-1112 (1982).

90 *See* Challenger v. Local 1, Int'l Bridge, Structural, & Ornamental Ironworkers, 619 F.2d 645, 649 (7th Cir. 1980) (making every claim dispute into federal lawsuit would place economic burden on plans).

91 Amato v. Bernard, 618 F.2d 559, 568 (9th Cir. 1980).

92 455 F. Supp. 816 (E.D.N.C. 1978).

93 *Id.* at 820 (quoting H.R. REP. No. 807, 93d Cong., 2d Sess. 15, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4670, 4682).

94 455 F. Supp. at 820.

95 *Id.*

and the congressional desire to encourage the proliferation of employee benefit plans by reducing the costs of claims settlement—suggest that Congress intended that claimants exhaust internal appeals procedures prior to seeking judicial review of a benefit denial under section 502(a)(1)(B). Nonetheless, traditional exceptions to the exhaustion requirement should still apply.[96] For example, if the claimant can demonstrate that exhaustion would cause irreparable harm or be futile, or that he has attempted to exhaust private remedies but has been denied meaningful access to the review process, courts should not require exhaustion.[97]

b. *Deference.* The same arguments that suggest claimants seeking judicial review under section 502(a)(1)(B) must exhaust internal claims procedures also support a policy of judicial deference to the outcome of such procedures. Granting de novo review of benefit claim denials would sap the administrative process of much of its value. Obligatory exhaustion of internal claims procedures would become a largely useless and costly step.[98] On the other hand, treating the results of such procedures as res judicata in a subsequent suit would deprive claimants of the judicial review that section 502(a)(1)(B) clearly contemplates. Recognizing this, most courts have adopted an intermediate yet deferential "arbitrary and capricious" standard for review of the results of internal claims procedures.[99] Generally, courts should decline to disturb the results of such procedures in subsequent ERISA suits under section 502(a)(1)(B).

2. *Arbitration*

ERISA's treatment of the appropriate relationship between ar-

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96 *See supra* note 27.

97 *See* Tomczyscyn v. Teamsters, Local 115 Health & Welfare Fund, 590 F. Supp. 211, 213 (E.D. Pa. 1984) (noting that courts recognize few exceptions due to "strong policies supporting exhaustion"); Lieske v. Morlock, 570 F. Supp. 1426, 1429-30 (N.D. Ill. 1983) (former employees denied distributions from benefit plan need not exhaust internal remedies in action alleging breach of fiduciary duty where plan administrators' conduct indicates further proceedings would be futile); Lucas v. Warner & Swasey Co., 475 F. Supp. 1071, 1074 (E.D. Pa. 1979) (recognizing but declining application of exceptions to exhaustion requirement).

Under regulations promulgated by the Secretary of Labor, if a plan fails to respond to a claimant's request for review of a benefit denial within 60 days (120 days with an extension), the request is deemed denied and the claimant may bring a civil action on the merits. 29 C.F.R. § 2560.503-1(h)(1)(i) (1985).

98 *See* Mahan v. Reynolds Metals Co., 569 F. Supp. 482, 487 (E.D. Ark. 1983) (rejecting de novo review because it "would defeat any purpose to be served by the administrative procedures set out under the pension plan"), *aff'd on other grounds,* 739 F.2d 388 (8th Cir. 1984).

99 For an argument that the arbitrary and capricious standard of review accords too much deference to fiduciaries, see Note, *supra* note 57. In any event, the outcome of intrafund review procedures is due a degree of respect.

bitration pursuant to a collective bargaining agreement and section 502(a)(1)(B) suits for benefits under a plan's terms is less clear. Although the conference report on the Act suggests that the traditional presumption of arbitrability applies,[100] elements of the statutory scheme pertaining to the creation of internal claims procedures[101] and fiduciary responsibilities[102] bear on the role of intrafund grievance procedures only; they provide little guidance as to the proper role of arbitration. Nevertheless, arbitration is well suited to resolve disputes over eligibility for benefits under a plan's terms. Moreover, in the collective bargaining process the claimant presumably agreed to submit disputes over the plan's terms and benefit eligibility under those terms to binding arbitration. Therefore, courts should require that the claimant exhaust the arbitral remedy and grant the resulting award the deference traditionally accorded arbitral outcomes.

a. *Exhaustion.* The scant relevant legislative history suggests that courts should require that claimants seeking judicial review of a benefit denial under section 502(a)(1)(B) first exhaust arbitral remedies. An earlier version of ERISA passed by the Senate permitted a civil action challenging a benefit claim denial "in lieu of submitting the dispute to arbitration under the plan."[103] Under this version, arbitration was an optional remedy, and a claimant could choose between bringing suit and arbitrating the dispute. This provision's omission from the final bill suggests that Congress intended either to dispense with arbitration altogether or to adopt it as an exclusive remedy. Given the deference historically paid arbitration and the specific invocation of LMRA section 301,[104] Congress probably intended the latter.

More important, courts should impose exhaustion on section 502(a)(1)(B) claimants subject to arbitration under a collective bargaining agreement because such claimants have already agreed to abide by the arbitrator's interpretation of the employment contract. Benefit plans under a collective bargaining agreement are part of the contract—the very contract that sets forth the agreement to arbitrate. In a section 502(a)(1)(B) suit, the claimant seeks judicial re-

100 *See supra* notes 80-84 and accompanying text.

101 *See supra* notes 85-88 and accompanying text. Regulations promulgated by the Secretary of Labor acknowledge that arbitration under a collective bargaining agreement satisfies the requirement that all benefit plans contain intrafund claims procedures. 29 C.F.R. § 2560.503-1(b)(2)(i) (1985). *See supra* note 7.

102 *See supra* notes 89-90 and accompanying text.

103 H.R. 2, 93d Cong., 2d Sess. § 691(b) (1974), *reprinted in* 3 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 3814 (1976).

104 *See supra* notes 80-83 and accompanying text.

view of the facts of the dispute and the meaning of the benefit plan terms contained in the collective bargaining agreement.[105] The parties, however, have already agreed to accept the arbitrator's interpretation of the agreement.[106] Courts should require that section 502(a)(1)(B) claimants exhaust arbitration because that is precisely the remedy bargained for.[107]

b. *Deference.* The nature of section 502(a)(1)(B) claims suggests that courts should treat a prior arbitral decision as res judicata in a subsequent ERISA suit. Such claims focus on disputed facts or differing interpretations of the benefit plan.[108] Arbitration is an appropriate means of settling such disputes.[109] As noted in the *Steelworkers* Trilogy, the arbitrator is an expert in the "law of the shop,"[110] the industrial "milieu"[111] in which the plan was formed. The virtues of an arbitrator as fact finder and contract-interpreter that were highlighted in the *Steelworkers* Trilogy apply here with equal force.[112] For example, in *Delaney v. Union Carbide Corp.*,[113] the collectively bargained employee benefit plan provided for arbitration before a medical board following denials of disability benefits. The plaintiff exhausted the grievance procedures and was denied benefits by the board.[114] In a subsequent ERISA action, the Eighth Circuit upheld the district court's grant of summary judgment for Union Carbide, stating:

> plaintiff alleges simply that he is in fact totally and permanently disabled, that the decision of the medical arbitrator to the contrary is incorrect, and that he is therefore entitled to benefits under the plan. That is the very sort of question that a medical arbitration board is most qualified to address . . . .[115]

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105 *See supra* notes 78-79 and accompanying text.

106 *See* St. Antoine, *supra* note 22, at 1141-42.

107 *See* Adams v. Gould, Inc., 687 F.2d 27, 32-33 (3d Cir. 1982) (parties bound by bargained choice of arbitration remedy), *cert. denied,* 460 U.S. 1085 (1983).

108 *See supra* notes 78-79 and accompanying text.

109 *Cf.* Murphy, *supra* note 29, at 131 ("If [ERISA] succeeds in its purpose, there will be a dramatic increase in employee claims for welfare and pension benefits. Arbitration has been used in many contexts as a means of coping with an increased volume of litigation; it should have the same attraction here.").

110 United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

111 United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring).

112 *See, e.g.,* Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 939 (3d Cir. 1985) ("contractually-based pension claims [are] subject to arbitral resolution just as contractually-based claims for breach of a collective-bargaining agreement have been held to be subject to arbitral resolution"); Adams v. Gould, Inc., 687 F.2d 27, 32 (3d Cir. 1982) (dispute over benefit denial under plan a "classic case for arbitration"), *cert. denied,* 460 U.S. 1085 (1983). *See generally* Schneider, *supra* note 81, at 294-95.

113 749 F.2d 17 (8th Cir. 1984).

114 *Id.* at 18.

115 *Id.* at 19.

The court properly held that the arbitral award precluded a subsequent suit for benefits under the plan's terms. Thus, courts should not review the merits of an arbitrator's decision in a subsequent benefit claim under section 502(a)(1)(B).

The contractual nature of collective bargaining agreements further supports judicial deference to arbitral results. Courts should refuse to review arbitral awards in section 502(a)(1)(B) because the parties to the arbitration agreed to be so bound. For the same reasons that claimants should be required to exhaust arbitral remedies,[116] the results of such proceedings should preclude a subsequent suit challenging the benefit denial.

In summary, courts should require claimants seeking section 502(a)(1)(B) judicial review of benefit denials to exhaust administrative procedures before bringing suit, regardless of whether those procedures consist of internal review by plan administrators or binding arbitration pursuant to a collective bargaining agreement. Similarly, save narrow exceptions,[117] courts should not disturb the results of these administrative procedures in subsequent section 502(a)(1)(B) suits.

B. Claims Alleging Violations of ERISA's Substantive Standards—Section 502(a)(3) Actions

ERISA does not impose an affirmative duty on employers to offer benefit plans.[118] However, once an employer offers a plan, ERISA establishes substantive standards with which the plan must comply.[119] A plan participant may bring suit in federal court under ERISA section 502(a)(3)[120] for breach of one of these statutory standards. Unlike their treatment of plan-based actions under section 502(a)(1)(B), courts should require exhaustion of section 502(a)(3) claims only when administrative procedures would serve to develop the case factually. Moreover, the results of the administrative process should not preclude the claimant's access to federal court in a subsequent section 502(a)(3) action. Rather, in such actions federal courts should conduct de novo review of the claim. Congressional intent and analogies to other areas of labor law support this distinc-

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116 *See supra* notes 105-07 and accompanying text.

117 A fiduciary's denial of benefits may be reversed if arbitrary and capricious. *See supra* text accompanying note 99. A court may overturn an arbitrator's decision if she exceeded her authority as defined by the collective bargaining agreement. *See supra* note 21 and accompanying text; *see also supra* note 27 and accompanying text.

118 *See* Viggiano v. Shenango China Div. of Anchor Hocking Corp., 750 F.2d 276, 279 (3d Cir. 1984) ("ERISA does not require an employer to establish a hospitalization plan nor continue it indefinitely.").

119 *See supra* notes 30-33 and accompanying text.

120 *See supra* note 5.

tion between claims for benefits under section 502(a)(1)(B) and actions to enforce ERISA's substantive guarantees under section 502(a)(3).

1. *Congressional Intent*

Although Congress expressly intended that section 502(a)(1)(B) claims be subordinate to the federal policy favoring administrative resolution of labor disputes, it declined to expressly subordinate rights-enforcement actions under section 502(a)(3) to this policy. Moreover, Congress's objectives of establishing uniform standards for plan management and facilitating recovery on valid claims that allege substantive ERISA violations are inconsistent with imposition of an exhaustion requirement and deference to the administrative result.

Congress invoked LMRA section 301 in reference only to plan-based claims under section 502(a)(1)(B).[121] It avoided doing so with respect to claims alleging substantive ERISA violations under section 502(a)(3).[122] Had Congress intended that courts apply the federal policy favoring administrative resolution of claims to ERISA rights-enforcement actions, it could have easily so provided. Yet Congress avoided linking LMRA section 301 to section 502(a)(3) actions. This suggests that the presumption of arbitrability and corresponding exhaustion requirement and the traditional deference to arbitral awards[123] should not apply to claims under section 502(a)(3).

Congress's desire to establish uniform standards for the regulation of benefit plans further supports providing claimants alleging statutory violations of ERISA with unimpeded access to federal courts. Section 514(e) provides that the Act displaces existing state law in the field of employee benefit plans.[124] ERISA's broad preemption of state law is desigued to promote uniformity in the en-

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121 *See supra* notes 80-83 and accompanying text.

122 Neither the portion of the conference report of the Act that links LMRA § 301(a) with ERISA § 502(a)(1)(B) nor any other part of the report says anything about ERISA § 502(a)(3) on this matter. *See* Donaldson, *supra* note 81, at 229.

The Secretary of Labor's regulations governing the use of internal claims procedures and arbitration to resolve claims disputes do not pertain to actions alleging violations of ERISA: "This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials . . . ." 29 C.F.R. § 2560.503-1(a) (1985). The regulations do not mention actions to enforce rights granted by ERISA. *See also* Amaro v. Continental Can Co., 724 F.2d 747, 751 (9th Cir. 1984) ("We are faced solely with an alleged violation of a protection afforded by ERISA. There is no internal appeal procedure either mandated or recommended by ERISA to hear these claims.").

123 *See supra* notes 14-27 and accompanying text.

124 *See supra* note 73 and accompanying text.

forcement of pension rights and to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."[125] The strength of the federal interest in uniform standards is evidenced by section 502(e)(1), which vests exclusive jurisdiction for substantive ERISA rights actions with federal courts, while both state and federal courts may entertain suits challenging benefits denials.[126] Similarly, section 502(a)(5)[127] permits the Secretary of Labor to file suit or join in an existing suit alleging violations of ERISA's substantive standards. In contrast, the government may not join in or file suits alleging a denial of benefits.

Uniformity is best promoted by permitting section 502(a)(3) claimants access to federal courts despite prior agreements to arbitrate or internal claims procedures. Because judges are bound by precedent and must state reasons for their decisions, they are more likely to formulate clear, articulate, *uniform* standards of conduct than are either arbitrators or plan administrators.[128] Furthermore, judges are expert at applying the law; the expertise of arbitrators lies elsewhere.[129] Congress must have intended that judges, not arbitrators or plan administrators, serve as the ultimate interpreters of ERISA's statutory standards. Therefore, prior agreements to arbitrate or internal claims procedures should not interfere with a section 502(a)(3) claimant's right to obtain access to federal courts.[130]

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125 SEN. REP. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4865. *See also, e.g.*, Authier v. Ginsberg, 757 F.2d 796, 802 (6th Cir.) (Congress preempted "state laws to provide a uniform source of law"), *cert. denied*, 106 S. Ct. 208 (1985); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1215 (8th Cir.) (same), *cert. denied*, 454 U.S. 968, 1084 (1981).

Prior to the enactment of ERISA, no federal cause of action existed for breach of fiduciary duty. Claimants had to rely on state fiduciary doctrines, which provided a myriad of standards. ERISA established one uniform standard. *See* Donaldson, *supra* note 81, at 228-29.

126 29 U.S.C. § 1132(e)(1) (1982). One commentator noted the significance of this distinction: "Congress may have provided a jurisdictional base for plan-enforcement actions that is broader than the exclusive federal jurisdiction for federal-rights actions because the federal interest is not nearly as strong in plan enforcement [sic] actions as it is in federal-rights actions, in which the integrity of ERISA's regnlatory scheme is at stake." Note, *supra* note 81, at 743.

127 ERISA § 502(a)(5) provides:

> A civil action may be brought—
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> . . . .
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> . . . by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter[.]

29 U.S.C. § 1132(a)(5) (1982).

128 *See, e.g.*, Schneider, *supra* note 81, at 285 (arbitration not appropriate for fiduciary breach claims because uniform standard is desirable).

129 *See supra* notes 22, 110-15 and accompanying text.

130 ERISA § 514(d), 29 U.S.C. § 1144(d) (1982), which provides that ERISA does

These concerns are not implicated in a benefit claim action under section 502(a)(1)(B). Yet they suggest that courts should provide de novo review of rights-enforcement actions under section 502(a)(3).

Congress also passed ERISA to protect the interests of participants of employee benefit plans.[131] Congress intended that civil suits by participants serve as the primary means of enforcing ERISA's standards.[132] To maximize enforcement, Congress relaxed venue requirements and procedural barriers to suit.[133] Permitting claimants alleging statutory violations unimpeded access to federal courts would best promote Congress's protective goal. Therefore, courts should not impose an exhaustion requirement on claimants alleging statutory violations of ERISA, and should accord little weight to prior administrative results in a subsequent section 502(a)(3) suit.[134]

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not supersede any other federal law, does not undermine this conclusion. In the context of § 502(a)(1)(B) claims, § 514(d) suggests that the federal policy favoring arbitration of labor disputes should remain in place. *See supra* note 84 and accompanying text. However, prior to the enactment of ERISA, states regulated pension plans. ERISA occupies a field never directly addressed by Congress or the federal courts prior to 1974. Thus, other than the LMRA, ERISA had no substantive federal law to supersede.

131 ERISA § 2(b) states that the Act's purpose is "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b) (1982). *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.").

132 "[T]he Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries." H.R. REP. No. 533, 93d Cong., 1st Sess. 2 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4640.

133 ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1) (1982). ERISA further provides that participants may sue the employee benefit plan itself. *Id.*

134 Arguably, courts should not enforce prior agreements to arbitrate fiduciary breach claims. ERISA § 410(a) provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a) (1982). ERISA § 409(a) provides that answering a civil action is a consequence of liability for breacb of fiduciary duty. 29 U.S.C. § 1109(a) (1982). Courts have construed the term "liability" such that venue provisions, expanded jurisdiction, and other "fringe benefits" conferred by a statute may be considered attributes of liability under federal protective legislation. *See, e.g.,* Wilko v. Swan, 346 U.S. 427, 437 (1953) (securities law); Boyd v. Grand Trunk W. Ry., 338 U.S. 263, 266 (1949) (Federal Employers' Liability Act); Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271, 277 (E.D. Pa. 1977) (ERISA). ERISA provides claimants with "fringe benefits" which ease access to federal courts. *See supra* note 133 and accompanying text. A prior agreement to arbitrate fiduciary breach claims could relieve a fiduciary of aspects of liability and should therefore be unenforceable under § 410(a). As the court stated in *Lewis v. Merrill Lynch,* "The right to select the forum and the mode of trial is part and parcel of 'liability,' itself." 431 F. Supp. at 277.

This prohibition of exculpatory clauses reaches fiduciary breach claims only and does not apply to substantive provisions of ERISA generally. *See* Donaldson, *supra* note

As the above elements of ERISA's legislative history and statutory aims demonstrate, courts should distinguish between benefit claims under section 502(a)(1)(B) and rights-enforcement actions under section 502(a)(3). Courts should not extend the traditional labor policy favoring administrative resolution of labor disputes to actions alleging violations of ERISA's statutory standards.

2. *Expansion of Federal Law into the Employer/Employee Relationship*

Increasingly, Congress has exerted its authority over the employer/employee relationship.[135] Courts have recognized and struggled with the tension between the traditional federal policy favoring administrative resolution of labor disputes and the need to vindicate newly conferred employee rights. An examination of how courts have resolved this tension under other federal laws supports the conclusion that courts should not dilute a claimant's right to federal court adjudication of alleged violations of ERISA's substantive standards by requiring exhaustion of administrative procedures and deferring to administrative results.

a. Alexander v. Gardner-Denver—*Title VII.* In *Alexander v. Gardner-Denver Co.*,[136] an employee alleging a violation of the nondiscrimination clause in his collective bargaining agreement submitted a grievance to binding arbitration pursuant to that agreement. After losing in arbitration, the employee filed suit under title VII[137] in federal district court, which dismissed the action on the ground that the arbitral award precluded the subsequent suit.[138] A unanimous Supreme Court held that the arbitrator's denial of the claim did not foreclose the employee's right to subsequent de novo review in federal court under title VII even though the suit arose from the same facts as the arbitrated grievance. The Court reasoned that title VII rights exist independent of contractual rights, even though the employment contract was the trigger that brought title VII into play.[139] The contractual and statutory remedies represented two distinct means of vindicating the employee's rights. The Court drew

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81, at 227-30 (arguing that federal courts should not defer to arbitration process when deciding whether to exercise jurisdiction over fiduciary breach claims).

Courts face a difficult problem when a participant invokes § 502(a)(1)(B) to challenge a benefit denial under the plan's terms and also alleges that the administrator's interpretation of the plan constitutes a breach of her fiduciary duty. *See infra* notes 181-84 and accompanying text.

135 *See supra* note 28 and accompanying text.

136 415 U.S. 36 (1974).

137 Civil Rights Act of 1964, tit. vii, §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

138 415 U.S. at 42-43. The Tenth Circuit affirmed. *Id.* at 43.

139 *Id.* at 49-50.

a distinction between rights collectively conferred on all employees by the collective bargaining agreement and rights bestowed on each employee individually by the federal statute, holding that the existence of the former did not dilute the latter.[140]

In declining to defer to the arbitrator's decision, the Court concluded that "[a]rbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII."[141] First, the Court explained, the arbitrator's power derives from his special ability to interpret the collective bargaining agreement. Thus, the arbitrator's role is to effectuate the parties' intent under the contract, not to uphold the federal policy expressed in title VII.[142] Second, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[143] The legislative history of title VII indicates that Congress placed ultimate authority for its enforcement in the courts, relying upon judicial construction to effectuate its aims and policies.[144] Last, claimants enjoy greater protections in judicial (as opposed to arbitral) proceedings, including development of a more complete record, use of the rules of evidence, adherence to precedent, and greater procedural formality.[145] The Court refrained from dismissing arbitration altogether, expressly permitting the introduction of arbitral results as evidence at a later trial without indicating the weight they should be accorded.[146] Nonetheless, subsequent

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140 *Id.* The Court stated:

> [T]here can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. . . . These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's structures . . . command that each employee be free from discriminatory practices.

Id. at 51 (citations omitted).

141 *Id.* at 56.

142 *Id.* at 56-57.

143 *Id.* at 57.

144 *Id.*

145 *Id.*

146 The Court stated:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an em-

courts have held that under *Alexander*, title VII claimants need not exhaust arbitral remedies before bringing suit.[147]

b. Barrentine v. Arkansas-Best—*Fair Labor Standards Act*. The erosion of judicial deference to arbitral results begun in *Alexander* continued in *Barrentine v. Arkansas-Best Freight System, Inc.*[148] The *Barrentine* Court held that an employee could bring suit in federal court based on rights arising out of the Fair Labor Standards Act of 1938 (FLSA)[149] notwithstanding the prior completion of arbitration required by a collective bargaining agreement. *Barrentine* demonstrates that the erosion of deference to arbitration reached beyond statutes of the "highest priority," like title VII,[150] extending to other federal laws, such as the FLSA. The Court stated, "While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers."[151]

The Court reasoned that many of the same infirmities in the arbitral process that the *Alexander* Court highlighted were present in this case, adding that the FLSA specifically provides broad access to courts and does not expressly require exhaustion.[152] In addition, the Court saw no guarantee that a union, as an employee's representative, would vigorously pursue his claim in arbitration, for its interests might not be synonymous with his.[153] Furthermore, the arbitrator might very well be powerless to provide the relief that the employee is entitled to under the statute.[154] Finally, although the

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> ployee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. *But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.*

Id. at 60 n.21 (emphasis added). *See generally* Castle & Lansing, *supra* note 29.

147 *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 714-15 (7th Cir. 1969); King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968).

148 450 U.S. 728 (1981).

149 29 U.S.C. §§ 201-219 (1982).

150 *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (title VII's objectives were of "highest priority").

151 450 U.S. at 737.

152 *Id.* at 740.

153 *Id.* at 742. The Court continued, "Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights." *Id.* at 744.

154 "[N]ot only are arbitral procedures less protective of individual statutory rights than are judicial procedures, . . . but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief." *Id.* at 744-45 (citation omitted).

arbitrator may be competent to determine factual issues, he may lack the skill necessary to decide the ultimate legal issue: the employer's compliance with the FLSA.[155] That decision is best left to the court.

c. *Other Federal Laws.* Title VII[156] and the FLSA[157] are only two of the federal statutes deemed sufficiently important to warrant de novo judicial review of claims brought under them despite prior agreements to arbitrate. In *Wilko v Swan,*[158] the Court held that an agreement to arbitrate disputes arising out of securities transactions between a customer and a broker was unenforceable and could not foreclose a civil action under section 12(2) of the Securities Act of 1933.[159] Similarly, claimants need not arbitrate federal antitrust claims[160] and civil rights actions[161] in spite of prior agreements to do so.

d. *Implications for ERISA Civil Suits. Alexander* and *Barrentine* point toward an accommodation between the ERISA provisions granting access to federal courts and the traditional labor policy favoring administrative dispute resolution. For the same reasons that the Supreme Court required de novo review of the claims in *Alexander* and *Barrentine,* courts should not impede access to federal courts for section 502(a)(3) claims alleging violations of ERISA's substantive standards.

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155 *Id.* at 743.

156 *See supra* notes 136-47 and accompanying text.

157 *See supra* notes 148-55 and accompanying text.

158 346 U.S. 427 (1953).

159 15 U.S.C. § 77*l*(2) (1982). The Court deemed the agreement to arbitrate void under § 14 of the Act, which forbids stipulations amounting to a waiver of compliance with the Act's provisions. The Court noted the unequal bargaining power of a customer and a broker, Congress's strongly worded desire to protect customers, and the likelihood that Congress's aims would be better upheld in courts. 346 U.S. at 435. *See also* Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532, 536-37 (3d Cir.) (extending *Wilko* to Securities Exchange Act of 1934), *cert. denied,* 429 U.S. 1010 (1976).

160 *See, e.g.,* Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974); A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715-16 (9th Cir. 1968); American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827-28 (2d Cir. 1968). *But see* Wilson v. Pye, No. 85 C 6341 (N.D. Ill. Jan. 3, 1986) (available on WESTLAW, Federal DCT database).

161 McDonald v. City of West Branch, 466 U.S. 284 (1984). The Court held that a discharged employee who unsuccessfully exhausted his arbitral remedies was not precluded from later filing suit alleging that his employers violated 42 U.S.C. § 1983 (1982) by firing him for exercising his first amendment rights. The Court stated, "[A]lthough arbitration is well suited to resolving contractual disputes, our decisions in *Barrentine* and *Gardner-Denver* compel the conclusion that it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard." 466 U.S. at 290.

The Supreme Court has ruled that prior agreements to arbitrate do not preclude civil claims under other federal statutes. *See, e.g.,* U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) (Seaman's Wages Act); McKinney v. Missouri-Kansas-Texas R.R., 357 U.S. 265, 268-70 (1958) (Universal Military Training and Service Act).

In enacting ERISA, Congress stressed the importance of setting minimum uniform standards for the administration of employee benefit plans.[162] These standards can best be enforced by granting litigants access to federal courts regardless of prior prospective agreements to arbitrate.[163] In *Alexander* and *Barrentine,* the Supreme Court recognized that arbitration cannot adequately vindicate federal statutory protections.[164] Those criticisms apply equally to claims alleging violations of ERISA's substantive rights.

Similarly, the presence of internal claims procedures should not diminish a claimant's right to obtain de novo review of a claim under section 502(a)(3) alleging a violation of ERISA's substantive standards. By requiring exhaustion of intrafund procedures and then treating the administrative results with great deference, courts would deny claimants the substantive protections ERISA provides. This is not to say that exhaustion of internal claims procedures should be dispensed with entirely. Such proceedings may develop a factual record, sharpen the dispute, or even satisfy the claimant at the administrative level. But as the *Alexander* Court cautioned, "courts should ever be mindful"[165] that Congress provided a judicial forum for the ultimate resolution of claims alleging violations of substantive rights created by federal statutes, such as ERISA. The availability of administrative procedures, whatever their nature, should not hinder the claimants' vindication of those rights.

The *Alexander* Court's distinction between individual and collective rights[166] serves to highlight the difference between suits to collect benefits under a plan and suits to uphold ERISA's statutory standards. Typically, management confers rights under an em-

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162 *See supra* notes 124-27 and accompanying text.

163 One commentator argues that arbitration is only efficient if it is final; otherwise, arbitration is merely one more time-consuming and costly step. Note, *Arbitration and Collectively Bargained Benefit Funds: Trustee Collection Choices after* Robbins v. Prosser, 37 ARK. L. REV. 440, 453, 455 (1983). Therefore, because arbitral resnlts should not be final, courts should not require exhaustion of arbitral remedies.

Furthermore, commentators have increasingly attacked the efficacy of arbitration. For example, one of the assumptions upon which the *Steelworkers* policy favoring arbitration relies is that union and management will agree upon an arbitrator because of their faith in his knowledge of the "law of the shop." *See supra* note 22. However, arbitrators are not necessarily expert. P. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 54 (1966); Getman, *Labor Arbitration and Dispute Resolution,* 88 YALE L.J. 916, 930 (1979). Frequently the parties' choice is based solely on a desire for victory and the perception that a given arbitrator will prove sympathetic. Castle & Lansing, *supra* note 29, at 61-62. The arbitrator may be pressured to "split the claim," rather than decide the dispute on the merits. *Id.* Although arbitration has frequently been touted as a means of avoiding the costs and delays that attend civil litigation, these benefits may be exaggerated. *Id.* at 62.

164 *See supra* notes 141-45, 152-55 and accompanying text.

165 Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974). *See supra* note 146.

166 415 U.S. at 49-50. *See supra* note 140.

ployee benefit plan upon employees collectively. As such, these plans are properly the subject of collective bargaining.[167] The federal labor policy, as embodied in the LMRA, provides that individual rights to file suit for breach of a collective bargaining agreement be subordinated to collectively established administrative procedures.[168] Therefore, claimants seeking benefits under a plan should be bound by prospective agreements to arbitrate, and should be required to exhaust administrative remedies. In contrast, Congress established ERISA's statutory standards to protect the rights of participants as individuals.[169] Like title VII and the FLSA, ERISA's aims and legislative history[170] require that these individual rights be vindicated in federal courts. Thus, courts should entertain jurisdiction over suits under section 502(a)(3) despite the availability of administrative dispute resolution procedures.[171]

C. Analysis of Judicial Recognition of the Distinction Between Section 502(a)(1)(B) Actions and Section 502(a)(3) Actions

Much of the confusion in the case law stems from the failure of some courts to distinguish between statutory and contractual (or, alternatively, individual and collective) rights under ERISA. For example, in *Kross v. Western Electric Co.*,[172] the court gave full force to the federal policy favoring administrative resolution of labor disputes without giving due regard to the underlying source of the plaintiff's claim—a violation of a substantive ERISA right.[173]

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167 Any term in a collective bargaining agreement which relates to wages, hours, or other conditions of employment is a mandatory subject of bargaining under LMRA § 8(d), 29 U.S.C. § 157(d) (1982). Pension benefits are deemed wages and are therefore subject to the LMRA. Inland Steel Co. v. NLRB, 170 F.2d 247, 253-54 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). *See* Glanzer, *The Impact of ERISA on Collective Bargaining*, 52 ST. JOHN'S L. REV. 531, 548 (1978).

168 *See supra* notes 14-27 and accompanying text.

169 *See* Castle & Lansing, *supra* note 29, at 72. The authors argue that individuals need greater protection, and that federal law recognizes that need. *Id.* Further, the union—the collective entity—is likely to submerge individual interests in the bargaining process. *Id.*

ERISA § 510, 29 U.S.C. § 1140 (1982) forbids discrimination based on pension status. *See supra* note 42. This parallels the individual protection provided employees by title VII, *see* 42 U.S.C. § 2000e-2(a) (1982), and the FLSA, *see* 29 U.S.C. § 206 (1982). As the Court noted in both *Alexander* and *Barrentine*, the arbitrator's expertise applies less to the vindication of individual rights than to enforcement of collectively bargained rights and duties. *See supra* notes 141-45, 152-55 and accompanying text.

170 *See supra* notes 121-34 and accompanying text.

171 The *Alexander* Court suggested that a court need not disregard the results of any prior administrative proceedings in a subsequent suit under ERISA § 502(a)(3). *See supra* note 146 and accompanying text.

172 701 F.2d 1238 (7th Cir. 1983). *See supra* notes 40-47 and accompanying text.

173 The *Kross* court noted that the claimant brought suit under § 502(a)(3). Nevertheless, it concluded that courts could require exhaustion wholly at their discretion. 701

Other courts have appreciated this distinction and shaped their decisions accordingly. For example, in an action alleging a violation of ERISA section 510[174] (the same section implicated in *Kross*), the Ninth Circuit in *Amaro v. Continental Can Co.*[175] held that the rights involved in the employees' contractual claim before the arbitrator were independent of those in their statutory claim under ERISA, even though each claim presented the same factual issue.[176] Similarly, the Third Circuit in *Barrowclough v. Kidder, Peabody & Co.*[177] held that in spite of a valid, binding agreement to arbitrate, the claimant retained the right to seek court review of his statute-based claims. After noting the friction between enforcing the agreement to arbitrate and providing a federal forum to vindicate ERISA's standards, the court stated:

> [T]he most reasonable accommodation is to hold that claims to establish or enforce rights to benefits . . . that are independent of claims based on violations of the substantive provisions of ERISA are subject to arbitration, . . . while claims of statutory violations can be brought in a federal court notwithstanding an agreement to arbitrate. . . . *Under the distinction we make between statutory and contractual claims, ERISA neither completely supplants nor is completely subordinate to arbitration.*[178]

This distinction between statutory and contractual claims also applies to intrafund procedures providing for review by the plan administrator. Section 502(a)(1)(B) claims remain subject to the federal policy favoring administrative resolution of labor disputes. Courts should require that claimants under section 502(a)(1)(B) ex-

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F.2d at 1244. Cases following *Kross* include: Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986); King v. James River-Pepperell, Inc., 592 F. Supp. 54 (D. Mass. 1984); Delisi v. United Parcel Serv., Inc., 580 F. Supp. 1572 (W.D. Pa. 1984).

174 29 U.S.C. § 1140 (1982). *See supra* note 42.

175 724 F.2d 747 (9th Cir. 1984).

176 *Id.* at 749. *Amaro* was followed in: Barrowclough v. Kidder, Peabody & Co., 752 F.2d 923, 939, 941 (3d Cir. 1985); Garry v. TRW, Inc., 603 F. Supp. 157, 163 (N.D. Ohio 1985); McLendon v. Continental Group, Inc., 602 F. Supp. 1492, 1503-04 (D.N.J. 1985) ("[W]hat is at issue here is not the enforcement of contractual rights, for which ERISA merely provides a federal forum, but the enforcement of the substantive right against discrimination on the basis of pension eligibility."); Grywczynski v. Shasta Beverages, Inc., 606 F. Supp. 61 (N.D. Cal. 1984).

177 752 F.2d 923 (3d Cir. 1985).

178 *Id.* at 939 (emphasis added) (citations omitted).

The district court had stayed plaintiff's ERISA claims pending the outcome of arbitration, later dismissing the ERISA claims in deference to the arbitral result. *Id.* at 928-29. On appeal, the Third Circuit reinstated the ERISA claims, remanding the case to the district court to determine whether the arbitral award could stand in light of the reinstatement of the ERISA claims. The court concluded that arbitration, while valid and binding with respect to plaintiff's contractual claims, could not be compelled with respect to claims alleging violations of ERISA's accounting requirements. *Id.* at 740.

haust administrative remedies and, subject to review under the arbitrary and capricious standard,[179] should bind them to the results. However, the federal policy favoring administrative resolution of labor disputes should not govern section 502(a)(3) claims. Courts still might properly require exhaustion, but should do so only when the administrative process will serve to develop the facts of the dispute. Courts should require exhaustion of intrafund procedures as a pragmatic means of developing the record or satisfying the claimant at the administrative level.[180] In any event, the claimant should retain the right to seek de novo review of her 502(a)(3) claim in federal court.

Admittedly, distinguishing between actions under a plan's terms and those alleging violations of ERISA's substantive standards may be difficult. A claimant might allege both that an administrator improperly interpreted the plan in denying benefits and that the administrator breached his duties as plan fiduciary. Conceivably, these claims could arise from precisely the same facts. For example in *Wilson v. Fischer & Porter Co. Pension Plan*[181] an arbitrator endorsed the plan administrators' interpretation of the claimant's right to benefits. In a subsequent ERISA suit, the plaintiff alleged that the plan administrators breached their duty as fiduciaries when they denied her claim.[182] The district court dismissed the suit, stating:

> although plaintiff claims to assert her rights under ERISA, the gravamen of her complaint is the interpretation of the Plan and the collective bargaining agreement. Her dissatisfaction with the results of the arbitration before an impartial arbitrator does not give her cause to adjudicate the matter *de novo* before this court.[183]

This case demonstrates that the contractual/statutory distinction is not always an easy one to make. If contractual and statutory claims overlap, courts should divide the claim, deferring to administrative

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179 *See supra* note 57 and accompanying text.

180 One might argue that if administrative procedures are to be granted any weight at all, they serve a useful function and should therefore be exhausted before claimants bring an action into federal court under § 502(a)(3). This position presents the risk that claimants will exhaust their financial resources, leaving nothing to pay for subsequent litigation. Further, courts might habitually defer to administrative results, denying claimants the de novo review of statutory claims which ERISA § 502(a)(3) clearly warrants. Therefore, courts should err on the side of the dispensing with the exhaustion requirement.

181 551 F. Supp. 593 (E.D. Pa. 1982).

182 The court did not specify which ERISA section supported jurisdiction—502(a)(1)(B) or 502(a)(3)—stating simply that the plaintiff "brings this action under § 502 of" ERISA. *Id.*

183 *Id.* at 595.

resolution of contractual claims and providing an independent judicial forum to hear statutory claims.[184]

A claimant's choice of jurisdictional label—section 502(a)(1)(B) or section 502(a)(3)—should not control. Proceeding on a case-by-case basis, courts can determine whether the underlying claim ultimately relies on section 502(a)(1)(B) or section 502(a)(3), giving full play to the federal policy favoring administrative resolution of labor disputes to the former, and freely asserting jurisdiction over the latter.

CONCLUSION

ERISA section 502(a), which provides employee benefit plan participants access to federal courts, is not wholly compatible with the longstanding federal labor policy favoring exhaustion of administrative remedies and deference to administrative results. Unsurprisingly, courts faced with this tension have reached different results. Nevertheless, ERISA's aims and statutory scheme provide a means of properly reconciling these conflicting goals.

When deciding whether to require that participants bringing suit under ERISA exhaust grievance procedures or what effect to give the resulting awards, courts should focus on the source of the plaintiffs' claims. If an action challenges a benefit denial and is ultimately based on factual eligibility under the terms of the plan or the proper interpretation of the plan, a court should give full force to the federal policy favoring administrative resolution of labor disputes. Thus, the court should require exhaustion of administrative procedures and defer to the administrative result.

However, if the action alleges a violation of ERISA's substantive guarantees, the arbitral result should not preclude a subsequent claim. A court should require exhaustion only when administrative procedures would serve to develop the facts or issues without prejudicing the claimant's rights under the Act. The legislative history and underlying aims of the Act suggest that courts should not subordinate the right of participants to seek enforcement of ERISA's substantive protections to the federal labor policy favoring arbitration. The erosion of this policy in other areas of labor law

184 This is the balance struck by the court in *Barrowclough*. *See supra* note 178. The court stayed the statutory claim pending the outcome of arbitration, thus mitigating the inefficiency accompanying the simultaneous pursuit of both contractual and statutory remedies.

In a sense, dividing a claim is inefficient if administrative procedures would resolve the entire dispute. Yet such "inefficiency" flows from the creation of any federal cause of action designed to protect individuals, be it title VII, the FLSA or ERISA. Congress deemed employee benefit plan participants worthy of protection; the courts should not withhold such protection in the name of efficiency.

further demonstrates that the vindication of the substantive rights ERISA confers on employee benefit plan participants ultimately rests with the federal courts.

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